

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 23, 2016

v

DAVID LARAY SMITH,
Defendant-Appellant.

No. 327062
Wayne Circuit Court
LC No. 14-006108-FC

Before: RONAYNE KRAUSE, P.J., and SAWYER and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his convictions after a bench trial of assault with intent to do great bodily harm less than murder, MCL 750.84 against Marcus Thornton, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 1-1/2 to 10 years' imprisonment for the assault conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant claims three errors on appeal: admission of a tainted identification, insufficiency of evidence and failure to make adequate fact findings. We affirm.

I. IDENTIFICATION TESTIMONY

Defendant, who is proceeding in propria persona on appeal, first argues that the trial court erred in admitting the identification testimony offered by Tytiana and Monique Hobbs, and Thornton. This issue has not been preserved for appeal because defendant did not object to the admission of the photographic lineups or the witnesses' identification testimony, or move to suppress the in-court identifications. *People McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001); *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995). Unpreserved evidentiary and constitutional issues are reviewed for plain error affecting substantial rights. *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004); *People v Houston*, 261 Mich App 463, 466; 683 NW2d 192 (2004), *aff'd* 473 Mich 399 (2005).

In *People v Williams*, 244 Mich App 533, 542-543; 624 NW2d 575 (2001), this Court observed:

An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process. In order to challenge an identification on the basis of lack of due process, "a defendant must

show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification.” If the trial court finds the procedure was impermissibly suggestive, evidence concerning the identification is inadmissible at trial unless an independent basis for in-court identification can be established “that is untainted by the suggestive pretrial procedure.” [Citations omitted.]

Although defendant asserts that his attorneys below characterized the photographic array at various points as “dubious” and “prejudicial,” he does not contend that the photo array was unduly suggestive, or explain why the array shown to the witnesses could be considered so suggestive that there was a substantial likelihood of misidentification. He does not contend, for example, that the police told the witnesses that they “have apprehended the right person” or shown that defendant was “singled out in some way,” *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998), as where apparent physical differences “substantially distinguish the defendant from the other lineup participants,” *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). Accordingly, he has not met his burden of establishing that admission of the witnesses’ identification testimony was plain error.

II. SUFFICIENCY OF THE EVIDENCE

This Court reviews “a challenge to the sufficiency of the evidence in a bench trial de novo and in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt.” *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005) (citation omitted). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). “It is for the trier of fact . . . to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence are to be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of assault with intent to do great bodily harm are (1) an assault, (2) done with an intent to do great bodily harm less than murder. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). An “assault” is defined as “either an attempt to commit a battery or an unlawful act that placed another in reasonable apprehension of receiving an immediate battery.” *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). “Great bodily harm means any physical injury that could seriously harm the health or function of the body.” M Crim JI 17.7(4). Assault with intent to do great bodily harm is a specific intent crime. *Parcha*, 227 Mich App at 239; *People v Mack*, 112 Mich App 605, 611; 317 NW2d 190 (1981). Specifically, a defendant must have “intent to do serious injury of an aggravated nature,” *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986), but “it is not necessary for any actual injury to occur,” *People v Dillard*, 303 Mich App 372, 378; 845 NW2d 518 (2013). The defendant’s intent may be inferred from all the facts and circumstances surrounding the crime, *People v Lugo*, 214 Mich App 699, 709-710; 542 NW2d 921 (1995), including the defendant’s acts, the means employed to commit the assault itself, and the extent of the victim’s injuries, although actual physical injury is not a necessary element of the crime, *People v Harrington*, 194 Mich

App 424, 430; 487 NW2d 479 (1992); *People v Cunningham*, 21 Mich App 381, 384; 175 NW2d 781 (1970); M Crim JI 17.7(4).

The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of any felony other than those four enumerated in the statute. MCL 750.227b(1); *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Thornton testified that defendant pointed a gun at him, and Tytiana and Monique agreed that defendant had a gun. Such conduct is sufficient to constitute an assault. *People v McConnell*, 124 Mich App 672, 678-679; 335 NW2d 226 (1983). Merely displaying a weapon implies a threat of violence and causes reasonable apprehension of an imminent battery. *People v Pace*, 102 Mich App 522, 534; 302 NW2d 216 (1980). Thornton, Monique, and Tytiana all testified that defendant shot Thornton in the legs at a close distance. The testimony was sufficient to prove the elements of assault with intent to do great bodily harm. *Parcha*, 227 Mich App at 239; *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). Further, because shooting requires the possession of a firearm, the evidence was also sufficient to support defendant's conviction of felony-firearm.

III. FACT FINDING

We reject defendant's argument that the trial court's factual findings were deficient because the court did not specifically find that he "had the clear specific intent to harm the complainant." "A judge who sits without a jury in a criminal trial must make specific findings of fact and state conclusions of law." *People v Shields*, 200 Mich App 554, 558; 504 NW2d 711 (1993). "Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts." MCR 2.517(A)(2). The trial court's factual findings are sufficient as long as it appears that the court was aware of the issues in the case and correctly applied the law. *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995); *People v Legg*, 197 Mich App 131, 134; 494 NW2d 797 (1992). The court is not required to make specific findings of fact regarding each element of the crime charged, but its findings should show how the court resolved credibility issues and conflicts in the evidence. *Id.*; *People v Ramsey*, 89 Mich App 468, 477; 280 NW2d 565 (1979). "A court's failure to find the facts does not require remand where it is manifest that the court was aware of the factual issue, that it resolved the issue, and that further explication would not facilitate appellate review." *Legg*, 197 Mich App at 134-135.

The trial court's instructions to itself indicated that it was aware that when defendant committed an assault, he must have "intended to cause great bodily harm." The court also weighed the intent factor when it decided that the evidence did not show intent to commit murder. The court weighed the credibility of the witnesses it heard. The trial court believed the prosecution witnesses' testimony that defendant was one of the two gunmen present and that he shot Thornton in the legs. It relied on the fact that each witness's testimony on those points was consistent with that of the others, and it rejected defendant's alibi defense, in part because the Horton sisters provided inconsistent testimony regarding Diane's purchase at Walmart and in part because defendant's and the sisters' testimony conflicted with that of Day. "The credibility of the identification testimony was a matter for the trial court, as the trier of fact, to decide," and

this Court “will not resolve it anew.” *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). Likewise, it was up to the trier of fact to determine the credibility of the alibi witnesses, *People v Diaz*, 98 Mich App 675, 682; 296 NW2d 337 (1980), and “[t]his Court will not interfere with the trier of fact’s role of determining . . . the credibility of witnesses,” *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Apparently because defendant shot Thornton in a nonvital area, the trial court found that he did not harbor “any intent to murder,” but he did act with the intent “to do great bodily harm less than murder.” The trial court’s findings showed that it was aware of the issues and correctly applied the law.

Affirmed.

/s/ Amy Ronayne Krause
/s/ David H. Sawyer
/s/ Cynthia Diane Stephens